Supreme Court, U.S.
FILED
NOV 2 - 2015
OFFICE OF THE CLERK

No. 14-981

In The Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION, TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AMERICAN SCHOOL COUNSELORS ASSOCIATION, ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, AND PDK INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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INTERESTS OF *AMICI CURIAE*[1]

National School Boards Association ("NSBA") is a not-for-profit organization of state associations of

[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici*, members, or their counsel made a monetary contribution to the brief's preparation or submission.

school boards. Through its members, NSBA represents approximately 13,800 school districts across the United States that serve more than 50 million public school students. NSBA's members share a deep commitment to ensuring that all children receive a high-quality education that fully prepares them to succeed as productive citizens in our society. NSBA's members recognize the vital role of diversity in ensuring that high-quality education, and have relied on longstanding principles of this Court to inform their diversity-related efforts to foster success for all students. NSBA regularly represents its members' interests before Congress and federal and state courts, and has participated as *amicus curiae* in many cases related to diversity in education, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

Approximately 750 public school districts across the State of Texas are members of the Texas Association of School Boards Legal Assistance Fund ("TASB LAF"), which advocates the interests of local school districts in cases with potential statewide impact. TASB LAF is governed by three organizations: the Texas Association of School Boards, Inc. ("TASB"); the Texas Association of School Administrators ("TASA"); and the Texas Council of School Attorneys ("CSA"). TASB is a nonprofit corporation whose members are the approximately 1,030 public school boards in Texas. As locally-elected boards of Trustees, TASB's members are responsible for the governance of Texas public schools. *See* TEX. EDUC. CODE ANN. § 11.151(b) & (d). TASA represents the State's school superintendents and other

administrators responsible for carrying out education policies adopted by their local boards of trustees. CSA consists of attorneys who represent more than 90% of the public school districts in Texas.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. AASA members are the chief education advocates for children. AASA members advance the goals of public education and champion children's causes in their districts and nationwide. As school system leaders, AASA members set the pace for academic achievement. They help shape policy, oversee its implementation, and represent school districts to the public at large.

American School Counselors Association ("ASCA") is a nonprofit, 501(c)(3) professional organization that supports school counselors' efforts to help students focus on academic, personal/social, and career development. ASCA provides professional development, publications, and other resources, research, and advocacy to nearly 30,000 school counselors around the globe.

Founded in 1910, the Association of School Business Officials International ("ASBO International") is an educational association that supports school business professionals who are passionate about quality education. ASBO

International is committed to providing programs and services that promote the highest standards of school business management, professional growth, and the effective use of educational resources. Through its programs, services, advocacy, and global network, ASBO International is the voice of school business officials.

The National Association of Secondary School Principals ("NASSP"), the leading organization of and voice for middle level and high school principals, assistant principals, and school leaders from across the United States and 35 countries, connects and engages school leaders through advocacy, research, education, and student programs. NASSP also promotes the intellectual growth, academic achievement, character and leadership development, and physical well-being of youth.

PDK International, publisher of *Kappan* magazine, is a professional association for educators that brings together the top leaders, thinkers, and doers to collaborate and inspire one another. By providing professional learning opportunities, targeted networking, and relevant research, PDK International helps researchers and practitioners deepen their expertise, elevate their careers, and ultimately experience better results in their work.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As this Court has recognized, the educational benefits that flow from a diverse student body are compelling throughout the education spectrum, including elementary and secondary schools. The

pursuit of diversity in higher education does not operate in a vacuum; the diversity efforts of colleges and universities affect school districts, and *vice versa*. This Court's consideration of whether mechanical admissions plans like the Texas Top Ten Percent plan negate the constitutionality of holistic review thus affects not only diversity in higher education, but also vitally important interests in diversity in the nation's elementary, middle, and high schools. For this reason, *amici* urge this Court to permit colleges the flexibility to adopt admissions plans that work synergistically with diversity efforts that promote educational goals in K-12 public schools.

Colleges and secondary schools alike realize educational benefits from diverse student populations, including higher student achievement, the development of critical thinking and interpersonal skills necessary to thrive in the twenty-first century economy, and increased civic engagement in our ever-more-diverse and pluralistic society. Increasing residential segregation heightens the need for schools to provide opportunities for students to engage with others from diverse backgrounds and perspectives, and at the same time increases the challenges for school districts trying to avoid the educational problems that accompany racial isolation and to achieve diverse learning environments.

University programs that move beyond mechanical percentage plans to seek qualitative diversity through holistic review support and reinforce school districts' efforts to achieve diversity. They permit universities to acknowledge the valuable and unique contributions that students educated in

integrated elementary and secondary environments can make to the college community, reinforcing the values school districts are attempting to inculcate in all students. By increasing college opportunities for such students, the programs encourage high levels of high school achievement, which in turn results in greater college access and diversity in the collegiate applicant pool. College-level holistic review and secondary school diversity efforts thus work together to further opportunities and achievement for all students.

While mechanical class-rank-based admissions programs may yield some numerical diversity on college campuses, they may work at cross purposes to school districts' efforts to promote the educational benefits of diverse schools. Both secondary and post-secondary diversity are compelling interests recognized by this Court. This Court should not interpret the Equal Protection Clause to restrict securing college-level diversity to means predicated on continued segregation in secondary education.

ARGUMENT

I. THE INTEREST IN DIVERSITY IS COMPELLING THROUGHOUT THE EDUCATION SYSTEM, INCLUDING FOR ELEMENTARY AND SECONDARY SCHOOLS.

A. Preventing Racial Isolation and Creating a Diverse Student Population Are Compelling Interests.

As the Court observed in *Fisher v. University of Texas at Austin* (*Fisher I*), there is a compelling

interest "in the educational benefits that flow from a diverse student body." 133 S. Ct. 2411, 2417 (2013) (citing *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307-309 (1978) (opinion of Powell, J.)). A diverse student body "serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Id.* at 2418.

That interest is equally compelling in elementary and secondary education. The "Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment). School districts need not "accept the status quo of racial isolation in schools" created by residential segregation. *Id.* at 788. Rather, a "compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue." *Id.* at 797. Likewise, "a district may consider it a compelling interest to achieve a diverse student population," of which race is but one component among many, including economic background, special needs, and special talents. *Id.* at 797-98; *see also id.* at 865 (Breyer, J., dissenting) ("Just as diversity in higher education was deemed compelling ***, diversity in public primary and secondary schools—where there is even more to gain—must be, *a fortiori*, a compelling state interest.").

Because sometimes "neighborhoods in our communities do not reflect the diversity of our Nation

as a whole," school districts—like many universities—consider it part of their mission to continue the "important work of bringing together students of different racial, ethnic, and economic backgrounds" through a "nuanced, individual evaluation of school needs and student characteristics that might include race as a component." *Parents Involved*, 551 U.S. at 791, 798 (Kennedy, J., concurring in part and concurring in the judgment).

B. Education within a Diverse Student Body Provides Lifelong Benefits to All Students.

When schools are able to achieve diversity—including but not limited to racial and ethnic diversity—it delivers important benefits to *all* students, not just minority students. This Court has described those benefits at length in the higher education setting. *See Grutter v. Bollinger*, 539 U.S. 306, 330-332 (2003). Those benefits are equally robust and important in elementary and secondary schools, making diversity imperative throughout the education spectrum.

First, "[d]iverse learning environments provide benefits for all students, including improved academic achievement, the inculcation of democratic and civic values, and critical thinking, collaboration, and communication skills." Arthur L. Coleman et al., *Achieving Educational Excellence for All: A Guide to Diversity-Related Policy Strategies for School Districts* 6 (2011). Empirical studies indicate that all students benefit from diversity in terms of improved critical

thinking and improved social learning skills.[2] In addition, students who attend racially diverse schools achieve higher test scores and better grades, are more likely to graduate from high school, and are more likely to attend and graduate from college than their otherwise comparable peers who attend schools with high concentrations of minority and low-income students.[3]

These educational benefits do not accrue to the students alone. Rather, diversity in schools is essential to prepare students to meet the needs of twenty-first century employers. "Global business and homegrown firms alike demand workers that can relate to, understand, and engage people from all walks of life and from diverse backgrounds." Coleman, *Achieving Educational Excellence for All*, at 5. Many of the nation's economic sectors require that workers have the problem-solving and interpersonal skills that are enhanced by education in diverse environments.[4]

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[2] *See, e.g.*, Kathleen M. Brown, *The Educational Benefits of Diversity*, 5 LEADERSHIP & POL'Y IN SCHS. 325, 339, 344 (2006); Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, National Coalition on School Diversity Research Brief No. 8, Oct. 2012, at 1-2.

[3] *See, e.g.*, Roslyn A. Mickelson, *School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence*, National Coalition on School Diversity Research Brief No. 5, Mar. 2015, at 1-2; Douglas N. Harris, *Lost Learning, Forgotten Promises: A National Analysis of School Racial Segregation, Student Achievement, and "Controlled Choice" Plans* 3 (2006) (reporting regression analysis of test results from more than 18 million students indicating that minority students learn more in integrated schools).

[4] *See* Conference Bd. et al., *Are They Really Ready to Work? Employers' Perspectives on the Basic Knowledge and Applied*

Pluralistic education provides the type of learning experiences that aid student success in a labor market that demands early and continuing exposure to diversity.

Moreover, because schools are the "very foundation of good citizenship," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), education within a diverse student body develops citizenship traits, values, and social skills that make students productive and thriving citizens in our increasingly diverse democracy. Studies show that "children exposed to racially diverse peers in the classroom exhibit reduced adherence to racial stereotypes and reduced racial prejudice, and they are more willing to engage in voluntary interactions with peers of a different race." Jomills Henry Braddock II, *Looking Back: The Effects of Court-Ordered Desegregation*, *in* FROM THE COURTROOM TO THE CLASSROOM: THE SHIFTING LANDSCAPE OF SCHOOL DESEGREGATION 3, 11 (Claire E. Smrekar & Ellen B. Goldring eds., 2009).[5] This

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Skills of New Entrants to the 21st Century U.S. Workforce 49 (2006) (placing ability to handle diversity and to participate in teamwork and collaboration as two of the top five work-related skills expected to increase in importance over the next five years); Robert A. Garda, *The White Interest in School Integration*, 63 FLA. L. REV. 599, 630-43 (2011) (describing ways in which employers favor students who have developed cross-cultural competence enhanced by education in schools with diverse student bodies).

[5] *See also, e.g.*, Susan Eaton & Gina Chirichigno, *The Impact of Racially Diverse Schools in a Democratic Society*, National Coalition on School Diversity Research Brief No. 3, Mar. 2011 (describing research indicating that schools with more diverse student populations promote cross-racial understanding, reduce prejudice, and further social cohesion); Mickelson, *School*

effect tends to decrease residential segregation over time, resulting in a virtuous cycle.[6]

In sum, as with colleges, *see Grutter*, 539 U.S. at 330-332, the educational benefits of diversity in elementary and secondary schools stretch across many realms of student learning and development, including academic achievement, social and interpersonal skills, workplace preparation, and civic engagement. Securing those benefits is a compelling objective for the education system as a whole.

C. Stubborn and Growing Residential Segregation Heightens the Need for Diversity in Education.

Although the importance of education within a diverse setting is increasing in our ever-more-diverse society, the challenges to achieving that diversity are growing, too. Many communities have become increasingly segregated, often resulting in the resegregation of neighborhood schools. "Voluntary migration patterns and economic segregation have replaced legally imposed divisions." Coleman, *Achieving Educational Excellence for All*, at 5. Roughly two of every five black or Latino students attend intensely segregated schools (meaning 90-100% of students are minorities), up from fewer than one of every three in 1988. Gary Orfield, *Reviving the Goal*

Integration and K-12 Educational Outcomes, at 3 (diverse schools result in, *inter alia*, reductions in prejudice and increases in cross-racial friendships).

[6] Eaton & Chirichigno, *The Impact of Racially Diverse Schools in a Democratic Society*, at 3-4.

of an Integrated Society: A 21st Century Challenge 12 (2009).

This resegregation is not limited to a handful of areas; it spans the nation.[7] It creates both a heightened need for, and challenge to, the ability of school districts to create diverse learning environments. Where neighborhoods are less diverse, the education system may become a critical forum for providing students the opportunity to interact with others from different backgrounds and perspectives from an early age. Yet that same neighborhood segregation makes it more difficult for school districts to provide that opportunity. Notwithstanding that challenge, and although much work remains to be done, school districts across the country—like many colleges and universities—are engaged in an intensive effort to secure the educational benefits of diversity for their students.

These efforts include drawing attendance boundaries to achieve a socioeconomic balance in each school, multi-district initiatives whereby multiple neighboring districts create a metropolitan-wide learning community with the goal of improving

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[7] *See, e.g.*, Jennifer B. Ayscue et al., *Losing Ground: School Segregation in Massachusetts* v (2013); Genevieve Siegel-Hawley & Erica Frankenberg, *Southern Slippage: Growing School Segregation in the Most Desegregated Region of the Country* (2012); John Kucsera & Greg Flaxman, *The Western States: Profound Diversity but Severe Segregation for Latino Students* (2012); John Kucsera & Gary Orfield, *New York State's Extreme School Segregation: Inequality, Inaction, and a Damaged Future* (2014); Greg Flaxman et al., *A Status Quo of Segregation: Racial and Economic Imbalance in New Jersey Schools, 1989-2010* (2013).

diversity, and assignment plans that consider parental choice and individual student characteristics. *See* Coleman, *Achieving Educational Excellence for All*, at 33-35 (giving examples from different school districts); *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (describing measures available to school districts, including but not limited to "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; [and] recruiting students and faculty in a targeted fashion").

II. WHEN COLLEGES PURSUE QUALITATIVE DIVERSITY THROUGH A HOLISTIC REVIEW PROCESS, IT FURTHERS THE COMPELLING INTEREST IN DIVERSITY ACROSS THE EDUCATION SPECTRUM.

The pursuit of qualitative diversity, including consideration of race where necessary, is a critical part of the effort to achieve diversity in education. The efforts of school districts and universities in that regard go hand in hand, because elementary and secondary schools are part of a continuum of student learning and development with colleges and universities. Diversity in secondary schools helps secure the educational benefits of diversity in college, and *vice versa*. Students who are educated prior to college in diverse learning environments bring their educational and social experiences and competencies to their post-secondary communities; colleges seeking highly diverse admissions pools find such students when K-12 schools have successfully fostered diverse student bodies. Accordingly, the benefits of

educational diversity can be fully realized only if the pathways to diversity remain open at all levels of education. And it is vital that the means to achieve diversity at the post-secondary level do not discourage the ongoing efforts of the nation's school districts to limit racially isolated schooling caused by *de facto* segregation.

Yet that is exactly what a mechanical numbers-based process standing alone does: trade diversity in one setting for diversity in the other. Such plans yield numerical racial diversity in college only so long as secondary schools lack such diversity. As the Fifth Circuit found, such percentage plans are not by themselves adequate race-neutral alternatives to a holistic review process that permits colleges to achieve qualitative diversity that takes into account a broad array of qualifications and characteristics across all racial groups.

A. Qualitative Diversity Programs at the University Level Reinforce School Districts' Efforts to Achieve Integrated Elementary and Secondary Education.

One of the values of the University of Texas's holistic review process is that it permits the University to consider the many ways an individual might contribute to the rich and challenging educational environment of the university. *See Fisher I*, 133 S. Ct. at 2418 (The "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.") (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

That includes the ability to ensure a diversity of backgrounds within—as well as among—racial groups, and specifically the ability to consider, *inter alia*, whether a minority student brings to college the experience of learning and succeeding in an integrated environment. That not only promotes educational benefits in college, it also rewards and reinforces precisely the outcomes that pluralistic education at the secondary level seeks to achieve: graduating students, minority and non-minority, who have begun to develop the critical thinking and cross-cultural competencies essential to the future success of students individually and that of our society as a whole.

Studies demonstrate that students educated in integrated environments bring something unique to their colleges and universities: students who "study with diverse peers in high school are likely to be best prepared to positively engage diverse peers in college." Victor B. Saenz, *Breaking the Segregation Cycle: Examining Students' Precollege Racial Environments and College Diversity Experiences*, 34 REV. OF HIGHER ED. 1, 19 (2010). The efforts of school districts to achieve diverse learning environments thus benefit colleges, if they are permitted to consider the unique perspectives and contributions of students who have been educated in a pluralistic environment as part of a holistic review process that includes race as one factor.

The benefits of that holistic review process flow in both directions. A holistic review process like the admissions program at the University of Texas operates to create critical college opportunities for

minority students often better qualified than the non-minority students automatically admitted under the Top Ten Percent law. Its heightened focus upon individual student characteristics enhances the likelihood of college admission for those minority students graduating from the integrated schools that many school boards are striving to achieve. Those college opportunities, in turn, reinforce efforts to secure high student achievement at the secondary level. When students can see a clear pathway to college for students with similar backgrounds, interests, or experiences, they are more likely to strive in secondary school with an eye towards college success.[8] This effect is mutually reinforcing for diversity at the post-secondary level, as a clear pathway to college encourages more students to apply and increases the diversity of the collegiate applicant pool. Qualitative diversity at both ends of the education spectrum thus feeds on itself, generating beneficial effects in both directions and helping universities and school districts to provide all their students with the educational benefits of diversity.

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[8] *See, e.g.*, Monica Martinez & Shayna Kloppott, Pathways to College Network, *Improving College Access for Minority, Low-Income, and First Generation Students* 6 (2003) (the creation of "high expectations and clear pathways to postsecondary education" is essential to encouraging college attendance); Thurston Domina & Erik Ruzek, *Paving the Way: K-16 Partnerships for Higher Education Diversity and High School Reform*, 26 ED. POL'Y 243, 255 (2012) (reporting study indicating that "[d]istricts involved in comprehensive K-16 partnerships report surprisingly high levels of student academic achievement").

B. Restricting Universities to Mechanical Race-Neutral Alternatives Would Undermine Diversity Programs in Elementary and Secondary Schools.

Mechanical class-rank-based programs like the Texas Top Ten Percent plan admit students based on a single characteristic; they do not permit colleges the flexibility to make educational judgments about the value of the unique perspectives and contributions of minority students from integrated schools in the way that a holistic review process does. Such plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340. But that is not their only flaw. Restricting universities to such mechanical alternatives would put universities at cross purposes with school districts' efforts to achieve the educational benefits of diversity for elementary and secondary school students.

Although they are facially race-neutral, there is no doubt that programs like the Texas Top Ten Percent plan are race-conscious in design. While the intent of the Texas law may have been well-meaning, it was adopted with segregated secondary education as its premise. *See* House Research Organization, Bill Analysis, HB 588, pp. 4-5 (Apr. 15, 1997) ("Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse

population and ensure that a large, well qualified pool of minority students was admitted to Texas universities."). As the Fifth Circuit found, the numerical diversity gained from the Top Ten Percent plan stems "from a fundamental weakness in the Texas secondary education system," which is the "de facto segregation of schools in Texas." Pet. App. 32a-33a. It "depend[s] upon segregated schools to produce minority enrollment." *Id.* at 51a.[9]

School districts are striving where possible, however, to reverse the headwinds of residential segregation, and achieve more diverse educational experiences for their students. If mechanical top-percent plans become the only constitutionally permissible way for colleges to achieve diversity, then in many instances school districts' success at achieving diversity will come at the expense of diversity at the college level, and *vice versa*. Plans like Texas Top Ten Percent are not alone sustainable alternatives for colleges because, *inter alia*, they depend upon a condition that many school districts are actively trying to eliminate.

Because both school districts and universities have a compelling interest in the educational benefits of diversity, the sole premise of college diversity efforts should not be continued segregation in secondary schooling. As school districts make strides towards achieving diversity at the secondary level, flexibility to

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[9] Studies confirm the high degree of segregation in Texas schools. *See* Julian Vasquez Heilig & Jennifer Jellison Holme, *Nearly 50 Years Post-Jim Crow: Persisting and Expansive School Segregation for African American, Latina/o, and ELL Students in Texas*, 45 ED. & URBAN SOC'Y 69 (2013).

engage in holistic review at the university level only becomes more important, not less. It would rob Peter to pay Paul to declare now that the diversity achieved by race-neutral alternatives like Texas's Top Ten Percent plan eliminates the need for holistic review, when they are predicated on the very racial isolation in secondary education that school districts—and our society—have a compelling interest in ending.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted.

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